

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SECOND APPEAL NO. 143 OF 1988****For Approval and Signature:****HONOURABLE MR.JUSTICE R.S.GARG**

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1 Whether Reporters of Local Papers may be allowed
to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy
of the judgment ?

4 Whether this case involves a substantial question
of law as to the interpretation of the
Constitution of India, 1950 or any order made
thereunder ?

5 Whether it is to be circulated to the Civil
Judge?

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**BHUJ CENTRAL COOPERATIVE CONSUMERS
STORES LTD. -Appellant(s)**

Versus

M/S. NITIN AND CO. - Respondent(s)

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Appearance :

SHRI A.R. THACKER for Appellant(s).

SHRI K.K. SHAH for Respondent(s).

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG**Date : 12/12/2006****ORAL JUDGMENT**

The defendant, who had been unsuccessful before
the two Courts, is before this Court under Section 100 of
the Code of Civil Procedure with a complaint that the

learned two Courts did not appreciate the facts in their true perspective and also did not appreciate that the goods supplied by the plaintiff, M/s.Nitin & Company, were not of the prescribed standards and as the goods which were supplied by the plaintiff to the defendant were seized, confiscated and destroyed by the Municipal Administration, the learned trial Court, so also the Appellate Court, was not justified in decreeing the suit to the extent the price is unpaid to the seller (plaintiff).

2. The appeal has been admitted for hearing the parties on the following substantial question of law:

- "1) Whether there is an implied breach of condition of warranty and whether the plaintiff is entitled to the suit claim?*
- 2) Whether an entry in the books of accounts of the defendant-Society at Exh.84 amounts to acknowledgement of debt for the purpose of limitation?*
- 3) Whether the suit filed by the plaintiff is barred by the law of limitation?*
- 4) Whether the suit is not maintainable in view of the absence of the mandatory notice under sec. 167 of the Gujarat Cooperative Societies Act?*

5) *Whether the judgements of the lower Courts are vitiated because the documentary evidence on record, particularly, the statement of Narottamdas Karsandas dated 9th June, 1973 at Exh.93, the statement at Exh.96, the letter of the Mamlatdar dated 7th September, 1973 at Exh.98, the reports of the Public Analyst at Exhs.116 and 117 are not properly interpreted and appreciated?"*

3. Undiputedly, somewhere in the year 1973, under an order by the defendant, the plaintiff supplied vegetable ghee worth Rs.30,630/- to the defendant. The appellant-defendant paid a sum of Rs.26,000/- to the plaintiff, but, the remaining amount was not paid. Despite demand by the plaintiff, the amount was not paid, therefore, the plaintiff filed a suit for recovery of the unpaid price, interest and the legal expenses.

The defendant appeared in the Court and submitted in its defence that the said vegetable ghee was not as per the prescribed standards, it was seized by the Food Inspector of the Municipal Administration and thereafter, the plaintiff of the present case was prosecuted, but, on a technical ground of non-grant of an opportunity under Section-13(2) of the Prevention of Food

Adulteration Act, the plaintiff was discharged. It was submitted by the defendant that the entire quantity of ghee, which was in 151 tins, was seized by the Municipal Administration and was later on destroyed, therefore, the plaintiff was not entitled to recover the balance price. It is also submitted that the defendant had filed counter claim before the Court of the learned Civil Judge (J.D.) and also pleaded for set off, but, neither set off nor counter-claim could be entertained by the said Court which, at the material time, had pecuniary jurisdiction to the extent of Rs.20,000/- only.

4. It is submitted by the learned Counsel for the appellant that an independent suit was filed in the Court of the learned Civil Judge (S.D.), which was dismissed, and later on, an appeal came to be filed before the High Court, but, since after coming into force of the Gujarat Civil Courts Act, 2005, the said first appeal has been sent back for its hearing and disposal to the learned District Judge.

5. Reverting back to the defence raised in the written statement, it was contended by the defendant that the item not being in accordance with the prescribed standards, the plaintiff was not entitled to charge any

money.

6. Shri Thacker, learned Counsel for the appellant, placing reliance upon the substantial question of law No.(5), submits that the plaintiff had made certain statements before the Mamlatdar and had assured the Mamlatdar that he would withdraw the entire consignment and if that was so, the plaintiff was required to withdraw the consignment and repay the amount, which was paid by the defendant to the plaintiff.

The learned Counsel for the appellant has not pressed any other questions.

7. Shri K. K. Shah, learned Counsel for the respondent, submits that the Courts below were justified in decreeing the suit.

8. So far as filing of the suit at the instance of the defendant is concerned, undisputedly, it was filed subsequent to the filing of the present suit. Under the law, the said suit was deserved to be stayed under Section 10 of the Code of Civil Procedure, but, in case it is not stayed, then, the judgement granted in any of the matters first in time would operate as *res judicata*

in the second matter. At present, the position is that the judgements delivered by the trial Court in both the matters are under challenge. The judgements having not reached finality, the question of *res judicata* would not arise.

9. The question No.5, on which strong reliance is placed by the learned Counsel for the appellant, would simply show that his submission is that the judgement of the lower Courts are vitiated because the documentary evidence on record, more particularly, the statement of Narottamdas Karsandas at Exh.93, the statement at Exh.96, the letter of Mamlatdar at Exh.98, and the reports of the Public Analyst at Exhs.116 and 117 are not properly appreciated by the Courts.

10. So far as the reports of the Public Analyst at Exhs.116 and 117 are concerned, the same would be public document for the purpose of criminal procedure under the Prevention of Food Adulteration Act, 1954. Such reports otherwise also are experts' opinion and are required to be proved in a civil Court and in case the said reports are not proved, then, the said reports would not become admissible in evidence. The alleged statements of Narottam Karsandas contained in Exh.93, in fact, are

certified copy of the statement earlier recorded by some party. Even in a case like that, production of certified copy of such statements would not be the proof of such statements. The law requires that the original records must be called and the record-keeper must be asked that such statements are available with the original file and the document produced in the Court is the true certified copy of the said document. When any party tries to place reliance upon the earlier statement/admission of the other party, then, such a statement has to be produced before the said party and an opportunity of explanation is required to be given to such party, who is sought to be framed with the help and assistance of his/her admissions/statements. It is trite to say that production of a document is not the proof of the same.

10. So far as the letter of the Mamlatdar is concerned, that also has not been proved in accordance with law. If that is the legal position, then, the Question No.5 will have to be decided against the interest of the present appellant. It is, accordingly, so held. The appeal deserves to and is, accordingly, dismissed. No costs. Let a decree be framed accordingly.

[R.S.Garg, J.]

*kamlesh**